

The facts of the case now before me are so similar to the facts of that case that I feel bound to follow it; and I feel that had this unreported judgment been cited to him the learned Magistrate's decision might have been different.

The learned Deputy Public Prosecutor urged upon me that the evidence of Prosecution Witness No. 6, Fatimah binti Talib to the effect that she had rented her room from the accused was unsatisfactory in that she stated that she visited 2B, Irving Road only on that night and did not know whether the appellant was the chief tenant. This witness, however, was a prosecution witness and her evidence with regard to the sub-letting was corroborated by the evidence of the appellant. Even if it be a fact that she had only entered upon the sub-letting that very morning this would not in my opinion alter the position in law. The fact that she left the premises after the Police raid is really not surprising and does not in my view prove anything. It is also to be observed that the learned Magistrate who saw and heard the witnesses appears to have accepted as a fact that this particular room had been sub-let.

I therefore allowed the appeal and quashed the conviction.

Appeal allowed.

Solicitors for the appellant: *Lim, Lim & Oon.*

KOAY TEIK CHOO & ORS. v. REG.

[A. Cr. J. (Spenser Wilkinson J.) November 25, 1955]
[Penang — Criminal Appeal No. 46 of 1955]

Penal Code ss. 448 & 452 — House-trespass after preparation made for causing hurt — Burden of proof — Misdirection.

This was a case which arose from a quarrel between two families which eventuated in a fight. The learned Magistrate convicted the appellants of the offence of house-trespass after preparation made for causing hurt. In doing so he appeared to have wholly accepted the prosecution version of the facts and to reject entirely the defence version.

Held: (1) the learned Magistrate appeared to have used the wrong approach in this case, that is he approached the case upon the basis of which of two conflicting stories he should believe; (2) on the facts there was evidence of provocation on the part of the complainant and his family and therefore the conviction should be altered to convictions under s. 334 of the Penal Code in the case of the 1st and 3rd appellants; (3) there was no evidence that the 2nd appellant did anything in this case and therefore he should be acquitted.

Case referred to:—

- (1) *Mohamed Yatin v. Public Prosecutor* (1950)
M.L.J. 57; 1 M.L.R. 7.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoffe Abdoolcader for the appellants.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J. : — This appeal concerns a quarrel between two families which eventuated in a fight. The history of the case is somewhat unfortunate in that the charges preferred were really unsuited to the circumstances. The original charge was house-trespass with intent to cause hurt under section 448 of the Penal Code. This was amended when the trial began to a charge of house-trespass after preparation made for causing hurt under section 452 of the Code. In my opinion, however, the real complaint was causing hurt and indeed the prosecution in the Court below appears to have been conducted and presented the case substantially as a case of causing hurt, the evidence regarding the alleged preparation having been given quite incidentally in the course of long descriptions of an actual fight.

The result of charging the offence in this way was that difficult questions of law arose as to whether there was technically a house-trespass and whether or not there was preparation for causing hurt, with the result that the real issues of fact tended to become obscured. I do not know whether the learned Magistrate considered amending the charge at the close of the case for the prosecution, but I cannot help feeling that the trial would have been more satisfactory had he amended at that stage. At the hearing of the appeal the learned Deputy Public Prosecutor conceded that the case was more properly one of causing hurt and therefore the questions of law I have mentioned were not argued before me and the appeal proceeded mainly upon the questions whether upon the evidence the learned Magistrate was justified in convicting and whether or not he had misdirected himself upon the facts or upon the burden of proof.

The 3rd appellant having himself received sufficient injuries during the incident to keep him in hospital for three days made the first report to the Police and subsequently made a complaint to a Magistrate. What action, if any, has been taken on that complaint, I do not know and I have not inquired; but as there may be further proceedings in regard to this incident I prefer in this judgment to say as little about the facts as possible. The absence of any detailed comment upon the facts, however, must not be taken to mean that I have not given the very fullest consideration to the arguments put before me in this appeal and to the grounds of decision of the learned Magistrate.

Two questions of fact, however, must be touched upon. There is no doubt upon the evidence that the complainant and his nephew both received hurt at the hands of the 1st and 3rd appellants; but the prosecution version in no way accounts for the equally undoubted

facts that the 3rd appellant received quite considerable injuries; and that the 1st appellant received injuries to his hand which, I think, could not possibly have been caused by a simple blow with his own fist, unless it were a knock-out blow of considerable violence, of which there is no evidence at all. It appears to me that a story which leaves entirely unexplained important facts such as these cannot be wholly true and the learned Magistrate does not appear to have appreciated the importance of this point. I would add in fairness to the Magistrate that if the charge had been directed to the question of causing hurt he might not have overlooked this serious defect in the prosecution story.

The other question which must be mentioned is the question of timing. The learned Magistrate expressed the opinion that if the fight took place at about 9.15 p.m. it was quite impossible for accused Nos. 1 and 3 to be examined by the Doctor between 9 p.m. and 9.30 p.m. None of these times, however, purported to be exact and there was very strong evidence given on behalf of the defence that appellant No. 3 was at the Lido Cinema until the conclusion of the picture at about 8.50 p.m. to 9.15 p.m. If this question of timing was one of the reasons why the learned Magistrate considered the story of the defence improbable then in my opinion, as far as this point was concerned, the view he formed was against the weight of the evidence.

In addition to these two points, having carefully re-read the record in the light of all the matters raised by Counsel for the defence and by the learned Deputy Public Prosecutor I have come to the conclusion that the learned Magistrate has to some extent misdirected himself upon the burden of proof. This view is not based upon any particular phrases used in the grounds of decision but upon a general review of the whole case. Whatever the learned Magistrate may have said in his grounds of decision it appears to me that what he did in effect was wholly to accept the prosecution version of the facts and to reject entirely the defence version. He thus appears to me to have used the approach which in the case of *Mohamed Yatin bin Abu Bakar v. Public Prosecutor* ⁽¹⁾ I indicated was the wrong approach in a criminal trial—viz. he approached the case upon the basis of deciding which of two conflicting stories he should believe. One of the dangers of this approach is that it leaves entirely out of account the possibility (which in my opinion existed in a very high degree in the present case) that what has really been proved is something between the two stories. Here again the learned Magistrate was in the difficulty that he was deciding questions of trespass and preparation upon evidence which was mainly directed to the actual causing of hurt.

I understood from the arguments addressed to me that the Crown did not desire me to order a re-trial and that both sides were prepared to leave to me the question whether the charge should be altered or the sentences varied. I am faced with some difficulty in deciding what to do with the case. That the 1st and 3rd appellants caused hurt to the complainant and his nephew I have no doubt. Was this done in self-defence or upon provocation or in pursuance of a deliberate plan? It seems clear from the grounds of decision as a whole that the learned Magistrate took the view that it was a deliberately planned assault, but for the reasons I have indicated I do not think this was sufficiently proved. On the one hand after a most careful study of the record I have come to the conclusion that the weight of evidence is against the full acceptance of the defence story. Wherever the fight in fact started and whoever actually began it I feel sure, as a result of various pieces of evidence, that at least part of the action took place within the complainant's office. On the other hand there are many weaknesses in the prosecution story and a number of points which lend colour to the defence suggestion (borne out to a considerable extent by the documentary evidence) that there was provocation on the part of the complainant or his family. On the whole, therefore, it appears to me more probable than not that the appellants were provoked by the complainant or his family.

For these reasons I shall alter the convictions of the 1st and 3rd appellants to convictions under section 334 of the Penal Code. As regards the 2nd appellant I have not had an opportunity of hearing the argument of the Crown on the question of preparation for causing hurt. In view of the fact, however, that there is not a shred of evidence that this appellant did anything whatever with whatever object he may have been carrying I think he should have been given the benefit of the doubt even on the question of preparation, and I shall, therefore, set aside the order made against him calling upon him to enter into a bond and record instead an order of acquittal.

With regard to sentence I will confine myself to a simple announcement of the result at which I have arrived after most anxious consideration of all the facts and circumstances including the record and circumstances of the appellants. Both appellants are fined \$250 or one month's imprisonment in default and each will pay \$50 costs with two weeks' imprisonment in default.

Order accordingly.

Solicitors for the appellants: *Ong Huck Lim & Co.*

QUEK CHING KIM v. REG.

[A. Cr. J. (Whyatt C.J.): December 7, 1955]

[Singapore — Magistrate's Appeal No. 108 of 1955]

Common Gaming Houses Ordinance (Cap. 30), s. 4(c) — Charge wrongly worded — No offence disclosed in charge.

Criminal Procedure Code, 1955, s. 156(2) — Whether charge can be amended at the appellate stage.

In this case the appellant was charged and convicted on the following charge: "That you on or about the 4th day of January 1955 at 11.40 p.m. at 85 Rowell Road, Singapore, did assist in the management of a public lottery, to wit by being found in possession of 16 chap ji kee slips, and you have thereby committed an offence punishable under s. 4(c) Cap. 30." The appellant appealed against the conviction.

Held: (1) the charge was wrongly worded as it alleged that the appellant had assisted in the management of a lottery whereas the provisions of s. 4(c) of the Common Gaming Houses Ordinance relate only to "assisting" in the conduct of a lottery; (2) the charge as worded did not disclose any offence and therefore the conviction must be set aside.

The intention of s. 156(2) of the Criminal Procedure Code, which provides that any amendment to a charge should be read and explained to the accused, is that such amendments may only be made during the proceedings before a Magistrate.

MAGISTRATE'S APPEAL.

D. G. Osborne-Jones for the appellant.

J. F. McWilliam (Crown Counsel) for the respondent.

Whyatt C.J.: — This appeal was brought for the purpose of challenging the conviction by the learned Magistrate on the ground that the prosecution had failed to prove firstly, an overt act by the accused in furtherance of the offence, as it is suggested in *Braddell's Commentary on Common Gaming Houses* page 89 should be proved in cases of this kind, and secondly, that the chap ji kee slips, (which had no date on them) related to a lottery "then in progress"

These issues were fully argued by Counsel for the appellant and for the Crown but at the conclusion of their arguments the point was raised that the charge was erroneously worded and did not disclose an offence against section 4(c) of the Common Gaming Houses Ordinance. The charge, as framed, alleged that the accused had assisted in the "management" of a lottery whereas the provisions of section 4(c) relate only to "assisting" in the conduct of a lottery.

It was conceded by Counsel for the Crown that the charge as worded did not disclose any offence and that it was necessary for him to apply to amend the charge in order that the conviction might stand.

After an adjournment to allow Counsel on both sides to consider the position further, the hearing of

the appeal was resumed and Counsel for the Crown did not seek to press the point that he was entitled to ask the Appellate Court to amend the charge at the appellate stage. In adopting this attitude Counsel for the Crown stated that he was influenced by the fact that sub-section (2) of section 156 of the Criminal Procedure Code provided that any amendment to a charge should be read and explained to the accused, but since on appeal the accused was not necessarily present, it seemed to follow that the intention was that such amendments could only be made during the proceedings before a Magistrate.

I agreed with the view of Counsel for the Crown that the charge as worded did not disclose any offence and it was now too late to amend it so as to bring it within the provisions of section 4(c) of the Common Gaming Houses Ordinance. I accordingly allowed the appeal.

Appeal allowed.

Solicitors for the appellant: Osborne-Jones & Co.

Re SOO LEOT

[Cr. R. J. (Buhagiar J.) November 29, 1955]

[K. L. — Criminal Revision No. 24 of 1955]

Criminal Procedure Code (Cap. 6), s. 325 — Revision — Powers of High Court — Accomplice — Whether witness is an accomplice — Hearsay evidence.

In this case Soo Leot was charged with offences punishable under s. 414 and under ss. 465 and 471 of the Penal Code. At the conclusion of the trial the learned Magistrate acquitted and discharged the accused of all charges. On the hearing of the case on revision, counsel for the accused raised a preliminary objection to the revision. He submitted that in cases of acquittal, if the Public Prosecutor has not preferred an appeal, the High Court ought not to interfere.

The learned Magistrate in this case held that a witness was an accomplice as he had assisted the accused in disposing of 3 bicycles. It was clear from the evidence that the witness did not assist the accused in disposing of the bicycles which were the subject of the charges before the Court.

Held: (1) the powers of the High Court in revision are exercisable at the discretion of the Court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case; (2) in this case, the learned Magistrate was wrong in holding that the witness was an accomplice and therefore the order of acquittal and discharge must be set aside and a new trial ordered.

Cases referred to:—

- (1) *Sherkhan v. Anwarkhan* A.I.R. 1927 Nag. 170.